Supreme Court, U.S.
FILED
(1)
981715 APR 26 1999
No. 98- _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE C. MARSHALL
357 E. Chicago Ave.
Chicago, IL 60611

NATHAN LEWIN
Counsel of Record
PAUL F. ENZINNA
MILLER, CASSIDY,
LARROCA & LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

4938

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1014, which prohibits false statements in "applications" to certain financial institutions, applies to transactions unrelated to loans or other extensions of credit.

2. Whether the protection afforded by Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) to statements made in the course of plea negotiations may be deemed waived by cross-examination of a government witness and presentation of evidence that does not directly contradict a factual proffer made during such negotiations.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (i)

TABLE OF AUTHORITIES ..... (iv)

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 4

1. Introduction 4

2. The Evidence 4

3. The Appeal 7

REASONS FOR GRANTING THE WRIT 9

I. THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER 18 U.S.C. § 1014 APPLIES TO TRANSACTIONS NOT INVOLVING LOANS OR OTHER EXTENSIONS OF CREDIT 9

(a) The Seventh Circuit's Decision Conflicts With This Court's Precedent 10

(b) Federal Judges Construe Section 1014 As Limited to Loan Transactions 11

(c) Mr. Krilich Was Drawing On His Own Funds 11

(d) The Seventh Circuit Ignored Important Aids to Interpretation 13

(e) The Statute's Title Is Dispositive 14

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF FEDERAL RULE OF CRIMINAL PROCEDURE 11(e)(6) AND FEDERAL RULE OF EVIDENCE 410 CONFLICTS WITH THE REASONING OF A MAJORITY OF THIS COURT 15

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: ***Page(s)***

Almendarez-Torres v. United States,
118 S. Ct. 1219 (1998) 13

INS v. National Center for Immigrants' Rights, Inc.,
502 U.S. 183 (1991) 14

James v. Illinois,
493 U.S. 307 (1990) 20

Santobello v. New York,
404 U.S. 257 (1971) 15

United States v. Devoll,
39 F.3d 575 (5th Cir. 1994) 9, 10

United States v. Krown,
675 F.2d 46 (2d Cir. 1982) 13

United States v. McDow,
27 F.3d 132 (5th Cir. 1994) 9

United States v. Mezzanatto,
513 U.S. 196 (1995) 4, 15, 16, 19

United States v. Perrone,
936 F.2d 1403 (2d Cir. 1991) 16

United States v. Senak,
527 F.2d 129 (7th Cir. 1975) 18

United States v. Stevens,
935 F.2d 1380 (3d Cir. 1991) 16

United States v. Wade,
388 U.S. 218 (1967) 18

United States v. Wells,
519 U.S. 482 (1997) 11

United States v. Witkovich,
353 U.S. 194 (1957) 13

Williams v. United States,
458 U.S. 279 (1982) 9, 10, 13

STATUTES AND REGULATIONS:

12 C.F.R. § 9.8 12
§ 9.13 12

12 U.S.C. § 92a(c) 12
§ 92a(d) 12

18 U.S.C. § 1014 ..... *passim*

28 U.S.C. § 1254(1) 2

RULES:

Fed. R. Crim. P. 11(e)(6) ..... *passim*

Fed. R. Evid. 410 ..... *passim*

OTHER AUTHORITIES:

1 ABA Standards for Criminal Justice,
The Defense Function 4-7.6(b) (1979 & Supp. I 1986) 18

Bureau of Justice Statistics,
Sourcebook of Criminal Justice Statistics (1997) 16

Financial Institution Fraud Federal Prosecution
Manual (DOJ 1994) 17

2 Sand, Siffert, Loughlin and Reiss,
Modern Federal Jury Instructions (1998) 11

No. 98- _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert R. Krilich, Sr. respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on October 27, 1998.

OPINIONS BELOW

The opinion of a panel of the United States Court of Appeals for the Seventh Circuit, with one judge dissenting, is reported at 159 F.3d 1020 (7th Cir. 1998) and is reproduced at Pet. App. A, *infra*, 1a-21a. The order of the Seventh Circuit denying rehearing and rehearing en banc, over the dissent of two judges, is reported at 1999 U.S. App. LEXIS 1132 (7th Cir. Jan. 26, 1999) and is reproduced at Pet. App. B, *infra*, 22a.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on October 27, 1998. A timely petition for rehearing and suggestion for rehearing en banc was denied by the court of appeals on January 26, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1014 provides:

> *Loan and credit applications generally; renewals and discounts; crop insurance*
>
> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for

cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

STATEMENT

1. Introduction

This petition presents an important question of federal criminal law on which courts of appeals are in open disagreement: whether 18 U.S.C. § 1014, which states in its title that it prohibits false statements in "loan and credit applications" to certain financial institutions, applies in contexts unrelated to loans and other extensions of credit. In this case, the Seventh Circuit held that "transactions" unrelated to loans or other extensions of credit are within the scope of Section 1014. The Fifth Circuit has reached precisely the opposite conclusion. This Court should grant certiorari to resolve the issue and restore uniformity to the enforcement of an important federal criminal statute.

This petition also presents an important question with regard to the scope of permissible waivers of the protections of Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 410. In order to encourage plea negotiations in criminal cases, those Rules render inadmissible statements made by a defendant in such negotiations. This Court has held that the protections of those Rules may be waived, but a majority of this Court has indicated that waiver should not be inferred where it would have the effect of inhibiting plea discussions. *United States v. Mezzanatto*, 513 U.S. 196 (1995). The Seventh Circuit's waiver standard in this case would have precisely such an inhibiting effect because under it, a proffering defendant is prohibited from mounting any defense and, in the language of the district court, "might as well plead guilty."

2. The Evidence

In 1984, Robert R. Krilich, Sr. obtained Industrial Revenue Bond ["IRB"] financing in connection with three

real estate projects, principally the construction of nearly 1,200 residential units, apartments and townhouses in Oakbrook Terrace, Illinois. Tr. 108.[1] The IRB program utilizes tax-exempt bonds to make funds available to developers at below-market interest rates in order to stimulate construction of multi-family and low-income housing.

A developer in the IRB program borrows funds not from a bank, but from a third party, the issuer of the bonds. The borrowed funds in this case were placed in a trust administered by the trust departments of certain banks. The trust departments administering the funds were paid a fee, and were required, upon presentation of appropriate documentation, to disburse funds to pay expenses incurred on the IRB projects. In other words, the funds at issue here were Mr. Krilich's, and not the banks', and the banks exercised no discretion in the disbursement of the funds. Their ministerial duty was to pay when documentation was submitted.[2]

Fourteen of the fifteen counts of the indictment on which Mr. Krilich was convicted charged him with making false representations to the trust departments of the banks holding his IRB funds regarding the nature of the work for which funds were sought. The district court denied motions to dismiss these counts on the ground that they did not allege violations of 18 U.S.C. § 1014.

The petitioner also was charged and convicted, on Count 1 of the 15-count indictment, with a RICO conspiracy,

---

[1] References in the text to "Tr." are citations to the trial transcript prepared below. References to "R." are citations to the record on appeal.

[2] There was no evidence that anyone – investor, municipality or bank – lost any money as a result of the alleged scheme.

in which five overt acts of bribery were alleged. One of the bribery allegations (the "hole-in-one bribe") was that Mr. Krilich bribed the mayor of Oakbrook Terrace by staging a hole-in-one contest, which was won by the mayor's son. Another allegation was that Mr. Krilich paid the mayor $5,000 to obtain favorable rezoning.

Mr. Krilich had entered into plea negotiations prior to his indictment, hoping to resolve both the allegations that led to his indictment, as well as a pending criminal case against his son, Robert R. Krilich, Jr.[3] He made a proffer to prosecutors under a written agreement providing that, should the negotiations not result in a plea agreement, the substance of the proffer could not be used against him at trial unless he "should subsequently testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer." R. 92 at 5.

In cross-examining the government's witnesses, defense counsel sought to show that the prosecution had not met its burden of showing that Mr. Krilich had in fact staged the hole-in-one. Specifically, "[s]everal witnesses testified . . . that the ninth hole . . . is close to the clubhouse and easily observed." 159 F.3d at 1026. Two of these government witnesses testified that they were at the ninth hole when the hole-in-one occurred, and they did not see Mr. Krilich there.

---

[3] After learning that his employee, Terry Pearson, had stolen hundreds of thousands of dollars in IRB project funds by submitting false invoices, Mr. Krilich filed a criminal complaint against Pearson. Tr. 1065, 1398-1402. Mr. Krilich also sued Pearson to recover the stolen funds. Tr. 2287. When confronted with these accusations, Pearson sought to obtain favorable treatment from the United States Attorney's Office. He claimed that Mr. Krilich had been involved in bribes and false statements to banks, and offered to assist in an investigation of Mr. Krilich. Based on Pearson's claims, the United States Attorney's Office opened an investigation of Mr. Krilich. Tr. 1148-59.

Responding to the allegation that Mr. Krilich had paid a bribe to obtain favorable zoning, his attorney elicited testimony on cross-examination that the city attorney believed the new zoning was appropriate and that the procedures for altering the zoning were not exceptional. The vice president of Mr. Krilich's company also testified that he was unaware of any bribes. The defense offered no testimony directly contradicting the statements made by Mr. Krilich during his proffer.

The prosecution then sought to introduce in rebuttal statements that Mr. Krilich had made during his proffer. Government counsel claimed that Mr. Krilich had "present[ed] . . . position[s] inconsistent with [his] proffer." While recognizing that even a not guilty plea might be viewed as inconsistent with a proffer, and that an accused in Mr. Krilich's position "might as well plead guilty" once he has made a proffer, Tr. 2369, the district court permitted the prosecution to introduce evidence that during his plea negotiations Mr. Krilich had admitted staging the hole-in-one and paying the mayor to obtain favorable rezoning. Tr. 2483-84, 2488-89.

Mr. Krilich was thereupon convicted on all counts, and sentenced to 64 months' imprisonment. He was also ordered to forfeit $15,000,000 and his interest in Country Lakes Country Club golf course for his RICO conviction and $428,590.63 as a result of his convictions under 18 U.S.C. § 1014. R. 106.

3. The Appeal

Over a dissent by Judge Ripple, the court of appeals held that Section 1014 applies to *all* applications made to covered institutions, and not just those related to credit transactions. The majority held that because the statute is

"straightforward and broad," neither its title – which is limited to "[l]oans and credit applications" – nor its clear legislative history warrants any limitation on its scope. In dissent, Judge Ripple wrote that the majority's conclusion was inconsistent with "the Supreme Court's explicit determination that the statute was designed to provide 'penalties for making false statements or reports in connection with loans or other similar transactions.'" 159 F.3d at 1032 (*quoting Williams v. United States*, 458 U.S. 279, 289-90 (1982)).

The court of appeals also ruled that the district court properly admitted Mr. Krilich's proffer statements because, on cross-examination, his counsel elicited testimony inconsistent with his proffer. The court of appeals acknowledged that it was not inconsistent for Mr. Krilich to adduce testimony that particular witnesses had not seen him stage the hole-in-one. However, it held that by presenting evidence that "implied" that he had not committed acts to which he had admitted, Mr. Krilich took a position "inconsistent with" the proffer and thereby waived the protections of Rules 11(e)(6) and 410. *Id.* at 1026.

The court of appeals reasoned that by seeking to prove the proximity of the ninth hole (where the hole-in-one contest took place) to the clubhouse, and the ease with which that hole is observed, Krilich's counsel raised an inference inconsistent with the proffer. Testimony elicited on cross-examination that the rezoning decision was correct on the merits was also deemed by the court of appeals to be inconsistent with the proffer, as was testimony that the corporate vice-president was unaware of any bribes.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER 18 U.S.C. § 1014 APPLIES TO TRANSACTIONS NOT INVOLVING LOANS OR OTHER EXTENSIONS OF CREDIT

Section 1014 of Title 18 is entitled "*Loans and credit applications generally.*" Its terms govern anyone who "knowingly makes any false statement . . . for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . *upon any application, advance, discount . . . [or] commitment.*" (Emphasis added.) In *United States v. Devoll*, 39 F.3d 575, 578 (5th Cir. 1994), the Fifth Circuit held that the statute does not apply to a case in which the application was not directed to the lending activities of a financial institution.

The prosecution in *Devoll* argued "that Section 1014 does not require proof that a false statement was made for the purpose of influencing a financial institution in connection with its lending activities." 39 F.3d at 578. However, the Fifth Circuit held unequivocally "that Section 1014 relates only to lending activities by financial institutions." *Id.* at 579, *accord*, *United States v. McDow*, 27 F.3d 132, 135 (5th Cir 1994). The Fifth Circuit based its holding on this Court's interpretation of the statute in *Williams v. United States*, 458 U.S. 279 (1982), on the statute's legislative history, and on the fact that applying Section 1014 to non-credit transactions "would encompass fraud or false representations having nothing to do with financial transactions, such as fraud in an

employment contract or, for example, in a contract to provide goods or services." *Devoll, supra,* at 580.

The Seventh Circuit has reached a directly contrary conclusion in this case. Its reasoning is that the "plain meaning of the text" sweeps all "applications" within its reach.

(a) The Seventh Circuit's Decision Conflicts With This Court's Precedent.

In *Williams*, this Court undertook an exhaustive analysis of the legislative history, scope and purpose underlying Section 1014. Describing "the type of transactions proscribed by the [statute]" (*id.* at 288), this Court noted that eight of the ten financial institutions originally enumerated in Section 1014 "performed [no] duties other than the making of farm and home loans." *Id.* This Court then found that nothing in the "legislative history" of later "amendments adding institutions to 1014's list . . . suggested that the statute should be applicable to anything other than representations *in connection with conventional loan or related transactions*." *Id.* at 288-289 (emphasis added).

Other references by this Court clearly limit Section 1014 to loan transactions. The *Williams* Court pointed out that in 1964 "the Senate Committee on Banking and Currency declared that § 1014 'is designed primarily to apply *to borrowers* from Federal agencies or federally chartered organizations.'" *Id.* at 289 (emphasis added). The Court also repeated the House of Representatives' 1970 characterization of the statute as "relating to false statements *in loan and credit applications.*" *Id.* (emphasis added). Finally, with respect to a "second 1970 amendment," the *Williams* Court noted that the relevant Committee "Reports

accompanying the amendment stated simply that the addition 'would describe more explicitly the institutions which are covered by 18 U.S.C. § 1014, which provides penalties for making false statements or reports *in connection with loans or other similar transactions.*'" *Id.* at 289-290 (emphasis added).

(b) Federal Judges Construe Section 1014 As Limited to Loan Transactions.

A respected federal jury instruction treatise states, with respect to Section 1014, that "[t]he essence of the crime is the making of a false statement *in an application for a loan (or bank credit card)* for the purpose of influencing in any way the action of the bank *from which the loan is sought.*" 2 Sand, Siffert, Loughlin and Reiss, *Modern Federal Jury Instructions*, ¶ 37.03 at 37-27 (1998) (emphasis added). The authors explain, "Because *all* of the reported cases involve false statements with respect to lending activities [the instruction] makes clear that the false statement must have been made for the purpose of influencing the bank *in its lending activities.*" *Id.* at 37-38 (emphasis added).

(c) Mr. Krilich Was Drawing On His Own Funds.

The statutory purpose underlying Section 1014 is to protect the enumerated financial institutions from fraudulent loan and credit transactions.[4] But the funds at issue here belonged to Mr. Krilich, and were not loaned by the banks. The banks only held the funds, which had been irrevocably committed to Mr. Krilich by non-bank third-parties. The

---

[4] *Cf. United States v. Wells*, 519 U.S. 482, 490 n.9 (1997) (analyzing Section 1014 and referring to "false statements made for the purpose of influencing a *lender*") (emphasis added).

banks' trust departments were shown by the trial evidence to be separate from the banks' lending activities.[5] Tr. 1921.

Prosecution exhibits revealed that each of the disbursements at issue in this case was paid by a check from a trust department, and that no banking entity of the type envisioned by Section 1014, and no loan transaction, was implicated. The false statements charged did not relate to the bank's actions on any "application, advance or commitment." The transactions at issue included neither a promise of repayment nor any schedule for repayment. Mr. Krilich simply received funds that had already been irrevocably committed to him, in the documents establishing the funding for the project, by non-bank third-parties.

The false statements at issue in Counts Two through Fifteen were all made on "Disbursement Certificate And

---

[5] In fact, due to conflict-of-interest concerns, a statute requires that banks acting in a trustee capacity "shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in." 12 U.S.C. § 92a(c). The statute also provides that:

> No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account *and shall not be used by the bank in the conduct of its business* unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency.

Id. at (d) (emphasis added); *accord*, 12 C.F.R. §§ 9.8 & 9.13. The separation between the LaSalle National Bank as lender and its Trust Department has since been formalized by the incorporation of the Trust Department as a separate corporation. Tr. 1921-22.

Requisition" forms sent to the financial institutions in question. These forms, on their face, do not "appl[y]" for any credit from the bank, or ask for any advance or commitment from it.[6] Instead, each and every one of these forms uses the following language: "This instrument is Requisition No. ___ *instructing and authorizing* [the bank] to pay." (Emphasis added.) As one Trust Department employee testified, "I don't question the disbursements. If it has got the certification and disbursement requisition, it is not up to me to question the invoices. . . . Just pay them." Tr. 689.

(d) The Seventh Circuit Ignored Important Aids to Interpretation.

The Seventh Circuit's ruling was premised on its view that Section 1014 is unambiguous. It therefore refused to consider the statute's legislative history or its title – "Loan and credit applications generally; renewals and discounts; crop insurance" – in determining its breadth. In *Williams*, however, this Court found Section 1014 "not unambiguous." 458 U.S. at 290. A statute's title is a "'tool[] available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1226 (1998) (citation omitted).[7]

---

[6] *See United States v. Krown*, 675 F.2d 46, 51 (2d Cir. 1982) (under Section 1014, the "broad terms . . . application or commitment . . . must be interpreted with reference to the statute as a whole"); *accord*, *United States v. Witkovich*, 353 U.S. 194, 198 (1957) ("[a] restrictive meaning for what appear to be plain words may be indicated by the Act as a whole").

[7] In *Almendarez-Torres*, the Court relied on the words "criminal penalties" in the title of 8 U.S.C. § 1326 in holding that a subsection of the statute was a penalty provision, and did not define a separate crime. The Court ruled that its reliance on a statute's title in interpreting a statute was supported by the fact that the "title does not reflect careless, or mistaken, drafting, for the title is reinforced by a legislative history that speaks about, and only about, the creation of new penalties." *Id.* at

(e) The Statute's Title Is Dispositive.

INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183 (1991), concerned an INS regulation governing bonds securing the release of aliens pending deportation or exclusion proceedings. The regulation was titled "Condition against *unauthorized* employment," but the body of the regulation provided for "[a] condition barring employment" in such bonds, without the qualifier "unauthorized." *Id.* at 185 (emphasis added). The court of appeals interpreted the regulation to bar all employment, whether authorized or not, and invalidated the regulation. *Id.* at 189. Before this Court, the government asserted that the regulation's title was determinative, and that the regulation barred only unauthorized employment. *Id.* This Court found the regulation ambiguous on the question whether it barred all employment or only unauthorized employment. Relying, *inter alia*, on the regulation's title and "legislative history,"[8] this Court held that "[t]he text's generic reference to 'employment' should be read as a reference to the '*unauthorized* employment' identified in the paragraph's title." *Id.*

This case is identical to the *National Center for Immigrants' Rights* case. The text of the regulation at issue in *National Center for Immigrants' Rights* was as "straightforward and broad" as the Seventh Circuit found the text of Section 1014 to be. It clearly barred all employment, without limitation. This Court's limited reading of the statute involved in *National Center for Immigrants' Rights* is

---

1226. The same is true here. The legislative history of Section 1014 speaks only about credit transactions.

[8] The *National Center for Immigrants' Rights* Court relied on "the agency's comments when the rule was promulgated." 502 U.S. at 190.

precedent for what the court of appeals should have done in this case.

A conflict among the circuits over the substantive scope of an important and widely used federal criminal statute calls for resolution by this Court. Mr. Krilich faces fines and incarceration for actions that *would not be a federal crime* in other circuits. The reach of federal criminal law, and the liberty interests of affected citizens, should not be subject to accidents of geography.

II.

THE SEVENTH CIRCUIT'S INTERPRETATION OF FEDERAL RULE OF CRIMINAL PROCEDURE 11(e)(6) AND FEDERAL RULE OF EVIDENCE 410 CONFLICTS WITH THE REASONING OF A MAJORITY OF THIS COURT

"[T]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). In order to encourage plea agreements, Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence prohibit the introduction at trial of any statement made by a defendant in the course of unsuccessful plea discussions. *See United States v. Mezzanatto*, 513 U.S. 196, 206 (1995).

In order to further facilitate the plea bargaining process, this Court held in *Mezzanatto* that a defendant may waive the protections of these Rules. *Id.* Requiring a proffering defendant to waive the protections of the Rules if, in the event negotiations break down, the defendant contradicts the proffer at trial, provides an assurance of the

proffer's reliability, and thereby increases incentives to negotiate. *Id.* at 207-08.

However, in *Mezzanatto,* a majority of this Court took the position that even though a defendant may waive the protections of Rules 11(e)(6) and 410, that implied waiver is to be carefully limited, in order to protect the goal of encouraging plea bargaining. *Mezzanatto,* 513 U.S. at 211 (Ginsburg, O'Connor and Breyer, JJ., concurring); *id.* (Stevens and Souter, JJ., dissenting). In the words of the *Mezzanatto* concurrence, a waiver that does not encourage negotiation, but instead "severely undermine[s] a defendant's incentive to negotiate" is impermissible. *Id.*

The waiver the court of appeals found in this case does precisely that, frustrating the delicate balance this Court has attempted to strike in this area. As the district court noted, a finding of waiver in this case means that a proffering defendant "might as well plead guilty," because the threat of waiver will preclude such a defendant from mounting any effective defense. Such a result would "swallow[] the Rules," *id.* at 216 (Souter, J., dissenting), and destroy the incentive of defendants across the country to engage in plea bargaining More than 80% of all federal criminal cases end in plea agreements, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics* (1997) at 400-01, and as Justice Souter noted in *Mezzanatto*, federal prosecutors "routinely require waiver of Rules 410 and 11(e)(6) rights" before engaging in plea negotiations. *Mezzanatto*, 513 U.S. at 216 (Souter, J., dissenting). *See also, e.g., United States v. Perrone*, 936 F.2d 1403, 1411 (2d Cir. 1991) (plea discussions conditioned on understanding that statements could be used to impeach or rebut inconsistent evidence at trial); *United States v. Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991) ("Plea agreements . . . commonly contain a provision stating that proffer information that is disclosed during the course of plea negotiations is . . . admissible

for purposes of impeachment"); Financial Institution Fraud Federal Prosecution Manual, App. A Exh. 1 (DOJ 1994) (form proffer letter providing that statements may be used to impeach or rebut inconsistent evidence at trial).

The trial court permitted an FBI agent to testify that in plea negotiations, Mr. Krilich admitted staging the hole-in-one. The court of appeals held that Mr. Krilich waived the protections of Rules 11(e)(6) and 410 by eliciting testimony on cross-examination that the ninth hole is easily observed and that two government witnesses were at the ninth hole when the hole-in-one occurred, but didn't see Mr. Krilich there. 159 F.3d at 1026. This, said the court of appeals, was a "[position] inconsistent with" his admission because it "implied" that Mr. Krilich did not stage the hole-in-one. *Id.*

That ruling, however, makes it impossible to conduct plea discussions with a factual proffer without subjecting oneself to a guilty plea if the discussions fail, because a defendant in those circumstances may not even dispute whether the government has met its burden of proof. The witnesses who testified that they were at the ninth hole at the time of the hole-in-one but did not see Mr. Krilich there *did not testify that Mr. Krilich was not at the ninth hole, or that he was somewhere else.* Mr. Krilich's admission that he staged the hole-in-one was not inconsistent with a witness' testimony that he did not see the event. Eliciting testimony that many people could have seen the alleged crime, if it was committed, and suggesting that the prosecution failed to call witnesses who had seen it, casts doubt on the prosecutors' case, but is not inconsistent with an admission that the crime occurred. Testimony that Mr. Krilich was elsewhere or that a witness had seen a legitimate hole-in-one would, of course, have been inconsistent with the proffer. There was, however, no such testimony.

The defense did not assert that the hole-in-one scheme never took place. Rather, it asserted that the prosecution had not proved that it took place. The importance of this distinction cannot be exaggerated. If there is any core principle in criminal law, it is that a defendant has the right – under both the Due Process Clause of the Fifth Amendment and the Sixth Amendment's guarantee of the effective assistance of counsel – to force the prosecution to meet its burden of proof. The defendant also has the right to impeach the prosecution witnesses. As Justice White put it:

> The State has the obligation to present evidence. Defense counsel need present nothing, even if he knows what the truth is .... If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth.

United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., concurring in part and dissenting in part). The defense is barred from presenting false testimony, but it is not precluded from vigorously cross-examining a witness whom the lawyer knows to be telling the truth. "[U]nder our adversary system, the . . . truthful witness must be just as much subject to searching cross-examination as the glib liar." *United States v. Senak*, 527 F.2d 129, 139 (7th Cir. 1975); *see also* 1 ABA Standards for Criminal Justice, *The Defense Function* 4-7.6(b) at 4.90 (1979 & Supp. I 1986) ("a lawyer's belief or knowledge that the witness is telling the truth does not preclude cross-examination").

A defendant may admit that an event took place and still demonstrate that the prosecution's witnesses and evidence do not establish guilt beyond a reasonable doubt. A plea of not guilty is available to the guilty and innocent alike; it simply demands that the prosecution meet its constitutional burden of proof. If such an approach at trial is "inconsistent" with a proffer statement, and opens the door for admission of an inculpatory statement, then there is absolutely nothing a defendant can do to defend himself at trial after having made a proffer statement. As the trial court recognized, in these circumstances, "a defendant who proffers might as well plead guilty."

Testimony that the corporate vice-president was unaware of bribes was not "inconsistent" with the proffer, nor was evidence that the city attorney thought the rezoning proper and that the procedures followed in the rezoning were not unusual. Without testimony that the city attorney believed the rezoning proper, and that the procedures for adopting it were not unusual, the jury would have been free to surmise that the mere fact that the mayor supported it was circumstantial evidence of bribery. By presenting *truthful* testimony about the zoning process, and about the vice-president's lack of knowledge, Mr. Krilich merely sought to test the prosecution's proof that bribes were paid, without presenting any testimony contradicting the proffer statement.

The court of appeals' interpretation of the scope of permissible waiver under the plea statement rules would cause great institutional harm to the court system. The consequences of a ruling that "a defendant who proffers might as well plead guilty" will "severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining." *Mezzanatto*, 513 U.S. at 211 (Ginsburg, J., concurring). The "waiver" found by the district court and the court of appeals in this case is flatly inconsistent with the intent

of Congress, and with the views of a majority of this Court, and should be rejected.[9]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE C. MARSHALL
357 E. Chicago Ave.
Chicago, IL 60611

NATHAN LEWIN
Counsel of Record
PAUL F. ENZINNA
MILLER, CASSIDY,
LARROCA & LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

Dated: April 26, 1999

---

[9] In *James v. Illinois*, 493 U.S. 307 (1990), this Court held that illegally-seized evidence may not be introduced by the state to impeach the testimony of a defense witness other than the defendant. The *James* Court noted that permitting such use of the evidence would "chill some defendants from presenting their best defense – and sometimes any defense at all – through the testimony of others." *Id.* at 314-15. The Seventh Circuit's ruling in this case has precisely the same effect, making defendants less willing to offer "truthful and favorable" testimony out of fear that the witness's testimony would be "in sufficient tension" with a proffer statement as to allow the statement's introduction into evidence. This result is contrary to the *James* Court's ruling that the state may not use the threat that otherwise-inadmissible evidence will be made admissible "as a sword with which to dissuade defendants from presenting a meaningful defense." 493 U.S. at 317.

APPENDIX A
159 F.3d 1020

UNITED STATES OF AMERICA,
Plaintiff-Appellee, Cross-Appellant,

v.

ROBERT R. KRILICH,
Defendant-Appellant, Cross-Appellee.

Nos. 97-2721, 97-2977

United States Court of Appeals,
Seventh Circuit

Argued April 7, 1998

Decided Oct. 27, 1998

For UNITED STATES OF AMERICA, Plaintiff-Appellee: Joel D. Bertocchi, Stephen Heinze, Office of the United States Attorney, Criminal Division, Chicago, IL.

For ROBERT R. KRILICH, Defendant-Appellant (97-2721): Thomas D. Decker, Decker & Associates, Chicago, IL; Dennis A. Berkson, Chicago, IL; Lawrence C. Marshall, Northwestern University Legal Clinic, Chicago, IL; Herbert J. Miller, Jr., Nathan Lewin, Stephen L. Braga, Paul F. Enzinna, Miller, Cassidy, Larroca & Lewin, Washington, DC; Marc W. Martin, Chicago, IL.

For ILLINOIS ATTORNEYS FOR CRIMINAL JUSTICE, Amicus Curiae: Jeffrey Urdangen, Chicago, IL.

For FEDERAL DEFENDERS OF THE NORTHERN, CENTRAL AND SOUTHERN DISTRICTS OF ILLINOIS, Amicus Curiae: Carol A. Brook, Office of the Federal Defender Program, Chicago, IL.

For ROBERT R. KRILICH, Defendant-Appellee (97-2977): Thomas D. Decker, Decker & Associates, Chicago, IL; Dennis A. Berkson, Chicago, IL; Lawrence C. Marshall, Northwestern University Legal Clinic, Chicago, IL.

Before EASTERBROOK, RIPPLE, and EVANS, Circuit Judges. RIPPLE, Circuit Judge, concurring in part and dissenting in part.

EASTERBROOK, Circuit Judge.

A golfer's dream came true for Andy Sarallo. On June 19, 1985, Andy lined up at the ninth tee at Country Lakes Country Club and struck the ball; an observer on the ninth green pulled Andy's ball out of the hole. Andy's foursome jumped up and down and shouted for joy. Because the ninth hole at Country Lakes was the subject of a hole-in-one contest that day, Andy had just won his choice of a 1931 Cadillac or a check for $40,000!

A hole-in-one is quite a thrill because it happens so infrequently–perhaps one chance in 40,000, rarer than a 300 game in bowling. But Andy's chances were close to 100%, because his father was mayor of Oakbrook Terrace, Illinois, and the mayor's support was needed for a bond offering to finance an apartment complex to be built by Robert Krilich–who sponsored the contest, pulled the ball out of the hole, and became the defendant in this criminal case. Krilich and Mayor Sarallo agreed to use the golf tournament as the vehicle for a payoff. Krilich palmed one of Andy's golf balls, put his hand into the cup, and displayed the ball. Delivering the bribe in this way enabled Krilich to shift the

cost to the National Hole-In-One Association, which provided insurance. Thus fraud and bribery were coupled. Krilich admitted this scheme in a proffer to the United States Attorney, and he also conceded bribing the mayor to alter the zoning of some land and orchestrating the extraction of funds from municipal bond offerings. The bonds–Industrial Revenue Bonds, interest on which is not taxable to the investors–were sold to finance Krilich's developments. Because the bonds were limited to specific projects (tax exemption depended on that link), the funds were placed in trust, and the trustee banks were to release the money only to reimburse expenses associated with the projects. Preferring to use the money elsewhere, such as for payments on his yacht, Krilich instructed vendors to falsify their invoices and had those bogus invoices sent to the banks for payment out of the trust accounts.

Krilich was convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1962(d) (RICO), and a fraud statute, 18 U.S.C. § 1014. Krilich maintains on appeal that the district court erred by permitting the prosecutor to use some of the proffer's contents at his trial, that 18 U.S.C. § 1014 does not apply to his conduct, that the instructions improperly removed some issues from the jury's consideration, and that he is not criminally liable for other reasons. The United States argues in a cross-appeal that Krilich's 64-month prison sentence is too low.

I

Statements made during plea negotiations are inadmissible, Fed. R. Evid. 410; Fed. R. Crim. P. 11(e)(6), but a defendant may waive the right to prevent their use. *United States v. Mezzanatto*, 513 U.S. 196, 130 L. Ed. 2d 697, 115 S. Ct. 797 (1995). The agreement Krilich signed contains a conditional waiver:

> [S]hould [Krilich] subsequently testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer, nothing shall prevent the government from using the substance of the proffer at sentencing for any purpose, at trial for impeachment or in rebuttal testimony, or in a prosecution for perjury.

By authorizing the prosecutor to use his statements if he should contradict himself, Krilich made his representations more credible and thus strengthened his hand in negotiations. See *Mezzanatto*, 513 U.S. at 207; Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 Cardozo L. Rev. 1541 (1998). A prosecutor may be reluctant to negotiate; what has the defendant to offer? A statement that shows how the defendant's aid could assist the prosecutor in other cases (or lead to the appropriate sentence in this one) may get negotiations under way and set the stage for a favorable bargain. But a prosecutor needs assurance that the defendant is being candid. A conditional waiver of the kind Krilich signed tends to keep the defendant honest, which makes the proffer device more useful to the both sides. For this strategy to work the conditional waiver must be enforceable; its effect depends on making deceit costly. We therefore reject the argument that waivers should be construed against prosecutors; that might help Krilich today but would hinder bargaining for other defendants tomorrow. We give this waiver neither a stingy reading nor a generous one, but a natural reading, which leaves the parties in control through their choice of language.

This agreement allowed the prosecutor to use the proffer as evidence if Krilich were to "testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer". Introduction of the statements

thus was proper if either his testimony, see *United States v. Goodapple*, 958 F.2d 1402, 1409 (7th Cir. 1992), or evidence that he presented through the testimony of others, see *United States v. Richardson*, 130 F.3d 765, 778 (7th Cir. 1997); *United States v. Dortch*, 5 F.3d 1056, 1068 (7th Cir. 1993), contradicted the proffer. Because Krilich did not testify, only the second clause is at issue. Krilich wants us to limit this clause to evidence presented through his own witnesses; evidence obtained by cross-examination of the prosecution's witnesses does not count, he insists. But that would be an unnatural reading of the language. Evidence is evidence, whether it comes out on direct or cross-examination. One can "otherwise present" a position through arguments of counsel alone, so it is easy to see how a position can be "presented" by evidence developed on cross-examination and elaborated by counsel. When the prosecution's witnesses are inclined to accommodate the defense, as many were in this case, developing one's position through cross-examination is especially attractive.

The prosecutor's position about the effect of the language is as unrealistic as Krilich's. According to the prosecutor, putting on *any* defense permits the United States to introduce the statements. A plea of not guilty followed by passivity at trial is about all the defense can do, the prosecutor contends–though, when pressed at oral argument, the prosecutor allowed that Krilich could have avoided introduction of the statements if he had limited his cross-examination to "the credibility, weight and sufficiency of the government's evidence in ways that were extrinsic to the facts of the case". On this understanding, asking a witness on cross-examination whether he had been convicted of perjury would be "extrinsic to the facts of the case", but asking the witness whether he had been in a position to see what happened at the ninth green on June 19 would open the door to the use of the proffer. Such a distinction makes sense of neither the language in the contract nor the reason

why the waiver was *conditional*. The prosecutor wanted to give Krilich an incentive to tell the truth; Krilich wanted assurance that he could defend himself at trial if bargaining collapsed (for otherwise he was delivering himself into the prosecutor's hands); conditioning the use of the proffer statements on the presentation of a position "inconsistent with the proffer" does both of those things only if the judge must find genuine inconsistency before allowing use of the statements.

Impeachment of a witness need not be "contrary to" or "inconsistent with" a defendant's admission of guilt in a bargaining proffer. To take a simple example, the statements "I faked the hole-in-one on the ninth hole" (Krilich, in the proffer) and "I did not see Krilich palm a golf ball at the ninth hole on June 19" (a witness, on cross-examination) are not inconsistent. Investigation via cross-examination of witnesses' ability (or willingness) to observe and recount the facts they claim to have observed therefore could not have justified introduction of the proffer statements. Millions of people who live in Illinois did not see what happened at the ninth green on June 19; others who did see what happened may have had reasons to misrepresent what they saw; proof that a given person who took the stand at trial was in the set of nonobservers (or liars) is not "inconsistent" with the proffer. Statements are inconsistent only if the truth of one implies the falsity of the other. The statements "Krilich pulled a palmed ball from the cup at the ninth hole" and "Krilich wasn't at the ninth hole when Andy hit his shot" are inconsistent because the former statement cannot be true if the latter is. This appeal turns on whether Krilich elicited such inconsistent testimony. The district judge concluded that he had, and that assessment is not clearly erroneous.

Several witnesses testified, in response to questions from Krilich's attorney, that the ninth hole at Country Lakes Country Club is close to the clubhouse and easily observed.

Krilich wanted the jury to infer that no one would attempt to fake a hole-in-one there; that implication is inconsistent with the proffer. Defense counsel got two witnesses to say that they were at the ninth hole when Andy hit the shot but didn't think that Krilich was at the ninth hole then. This line of cross-examination was not designed to cast doubt on the witnesses' ability to see clearly or suggest that they are not trustworthy. Their testimony implied that Krilich did not fake the hole-in-one, contrary to what he admitted in his proffer. Similarly, in response to evidence that Krilich paid a bribe to obtain favorable zoning, his lawyer elicited testimony on cross-examination that no bribe was required because the city attorney thought the new zoning to be correct. Counsel likewise led witnesses to testify that the procedures followed for altering the zoning were not exceptional. Krilich's attorney also had the vice president of his company testify that he was not aware of *any* bribes paid to *any* public official in connection with *any* project. The implication was that if someone so close to Krilich (and the projects) was unaware of bribes, there must not have been any. These statements go well beyond casting doubt on the prosecutor's evidence; they advance a position inconsistent with the proffer–or so the trial judge sensibly could conclude.

Krilich insists that if the conditional waiver means what we think it means, then it is unenforceable because involuntary. *Mezzanatto* says that waivers of the plea-statement rules are unenforceable if given "unknowingly or involuntarily" (513 U.S. at 210), but this is a far cry from saying that waivers mean whatever the defendants say they understood them to mean; no party to a contract has Humpty Dumpty's power over language either directly or through the gambit that unanticipated consequences render the agreement "involuntary." A waiver is voluntary in the absence of coercion, *Colorado v. Connelly*, 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986); *United States v.*

Brooks, 125 F.3d 484, 492 (7th Cir. 1997), and is knowing if made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 106 S. Ct. 1135 (1986). Krilich does not contend that his assent was coerced and offers no support for a conclusion that he didn't understand the rights that Rules 410 and 11(e)(6) confer. A defendant's understanding of the consequences of his waiver need not be perfect; it was Krilich's understanding of the rights being relinquished, not of all possible repercussions of relinquishing them, that made his waiver knowing. See *Colorado v. Spring*, 479 U.S. 564, 93 L. Ed. 2d 954, 107 S. Ct. 851 (1987).

II

One of the racketeering acts supporting Krilich's RICO conviction is a bribe of Nicholae Ionescu, Zoning Administrator and City Engineer of Oakbrook Terrace. Facing troubles with federal environmental authorities, Krilich asked Ionescu to supply an affidavit stating that development should be allowed to continue. Ionescu signed the affidavit and that afternoon met with Krilich at a restaurant, where without saying a word Krilich passed Ionescu an envelope containing $300. Krilich contends that a "gratuitous after-the-fact payment" is insufficient to prove bribery in Illinois, whose law controls on this question.

Illinois does not treat payment before-the-fact as an element of bribery. See, e.g., *People v. Wright*, 105 Ill. App. 3d 187, 434 N.E.2d 26, 61 Ill. Dec. 89 (2d Dist. 1982). A corporation that pays employees at the end of the workweek instead of at the beginning does not give gifts every Friday. Thus Krilich must be arguing that, because the payment was gratuitous, it could not be a bribe. That's a tautology, but *whether* a payment was "gratuitous" is a question of fact, rightly left to the jury. Krilich believes that the prosecutor

adduced insufficient evidence of illicit intent behind the payment. But a reasonable jury could infer that this was a bribe–indeed, that Ionescu was on Krilich's payroll, so often had he been bribed before. The lack of *any* comment during the payoff is strong evidence that this payment was expected (for Ionescu's part) and offered as compensation for the affidavit (for Krilich's).

III

The indictment charges that Sarallo solicited the hole-in-one bribe in April 1985. At trial, however, the prosecution elicited testimony from Terry Pearson, Krilich's bagman, that the bribe was solicited in the months preceding April 1984. Everyone agrees that the hole-in-one bribe was in exchange for Sarallo's support in an April 1984 vote regarding the Oakbrook Terrace bond issue, so the date in the indictment is a blunder. Citing *Stirone v. United States*, 361 U.S. 212, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960), Krilich argues that the prosecutor, by arguing the new date at trial, constructively amended the indictment in violation of the grand jury clause of the fifth amendment. But charging that an act occurred on one date and proving that it occurred at a different time is a classic variance, which does not change the nature of the crime alleged. *United States v. Nicosia*, 638 F.2d 970, 976 (7th Cir. 1980). Compare *Stirone* with *United States v. Miller*, 471 U.S. 130, 85 L. Ed. 2d 99, 105 S. Ct. 1811 (1985). Cases such as *United States v. Willoughby*, 27 F.3d 263, 265-66 (7th Cir. 1994), like *Stirone* itself, involved the substitution of one criminal offense for another; a change of dates does not (the date of a crime is not an element of the offense). Krilich has not argued that the difference between the allegations and the proof prejudiced his ability to defend himself; variance here was harmless. *United States v. Cina*, 699 F.2d 853, 858-59 (7th Cir. 1983).

IV

Krilich was convicted of fourteen counts of violating 18 U.S.C. § 1014:

> Loan and credit applications generally; renewals and discounts; crop insurance
>
> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [12 U.S.C. § 3101 (1) and (3)]), or an

> organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

Krilich's agents made the false statements so that he could tap bond proceeds held in trust by banks. He argues that this provision applies only to statements made to obtain loans or other extensions of credit; because the withdrawals of the trust funds were not lending transactions, the statute was not violated, he submits. *United States v. Devoll*, 39 F.3d 575, 579-80 (5th Cir. 1994), supports this contention, but this court and at least two more have applied § 1014 to transactions other than loans. *United States v. Tucker*, 773 F.2d 136, 139 (7th Cir. 1985); *United States v. Yung Soo Yoo*, 833 F.2d 488 (3d Cir. 1987); *United States v. Bonnette*, 781 F.2d 357, 366 (4th Cir. 1986). *Tucker* affirmed a conviction of a con artist who forged shipping documents that led a bank to permit a draw against a letter of credit, so far as the opinion reveals, the letter of credit was fully funded and the only loser was the would-be purchaser. See also *United States v. Erskine*, 588 F.2d 721, 722 (9th Cir. 1978) (Kennedy, J.) (§ 1014 applies to "a loan or one of the other transactions listed in the statute"). Krilich ignores this adverse precedent but apparently wants us to overrule Tucker in order to follow *Devoll*.

Krilich faces an uphill battle. The text of the statute is straightforward and broad: it applies to "any" statement made for the purpose of influencing in "any" way the action of "any" of the covered institutions in "any" application. Krilich caused vendors to make false statements in applications presented to federally insured banks. To overcome § 1014's breadth Krilich relies on the title of the section, specifically the phrase "loan and credit applications generally". The title, according to Krilich, informs the reader that the statute applies only to applications for loans or credit, and not to applications for funds held in trust. Yet if the title limits the statute's breadth, then Krilich might as well argue that because his statements were not made in connection with "crop insurance" the statute does not apply to them. Although a statute's title can inform the understanding of ambiguous text, it does not "limit the plain meaning of the text". *Pennsylvania Department of Corrections v. Yeskey*, 141 L. Ed. 2d 215, 118 S. Ct. 1952, 1956 (1998) (quoting from *Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947)). This text is not ambiguous, and only last year the Supreme Court reminded us not to add elements to § 1014. See *United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921, 927, 137 L. Ed. d 107 (1997) (materiality is not mentioned in § 1014, a "natural reading" of § 1014 would not make it an element, and therefore the prosecutor need not establish that the false statement is material to the financial institution's decision).

The drumbeat of "any" in § 1014 is not the only reason to conclude that it applies to transactions other than loans (and crop insurance). It deals with misstatements to "a Federal Reserve bank, . . . the Office of Thrift Supervision, . . . the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, [and] the

National Credit Union Administration Board", among others. None of these institutions makes loans (or underwrites crop insurance); and although one could quibble with this assessment by saying that the discount activities of the Federal Reserve and some of the operations of the FDIC (or RTC) as receiver of failed financial institutions involve loans, the Office of Thrift Supervision and other listed bodies are just regulators. If their inclusion in the statute is to have meaning, then § 1014 *must* cover statements that are not designed to influence an extension of credit–indeed, must cover statements that have nothing to do with the payment of money. Krilich's statements, like those in *Tucker*, were designed to induce a financial institution to disburse money, so they are within the reach of § 1014. Tiebreakers and doubt resolvers such as the Rule of Lenity therefore do not help Krilich; his problem is not that the statute is ambiguous, but that it is comprehensive. Legislative history likewise is of no assistance, given the Supreme Court's view that legislative history may not be employed to limit the effect of a broadly worded statute. *Brogan v. United States*, 139 L. Ed. 2d 830, 118 S. Ct. 805, 810-11 (1998).

Williams v. United States, 458 U.S. 279, 73 L. Ed. 2d 767, 102 S. Ct. 3088 (1982), on which Krilich relies so heavily, does not support his thesis. *Williams* posed the question whether a no-funds check is a "false statement" for the purposes of § 1014; the Court concluded that the only "statement" made by a check is an instruction to the drawee bank to pay, and that the implication that funds are available for that purpose is not covered by § 1014 because a misleading implication differs from a false statement. Cf. *Bronston v. United States*, 409 U.S. 352, 34 L. Ed. 2d 568, 93 S. Ct. 595 (1973). Krilich can find no comfort in this conclusion; he induced vendors to make literally false statements. Only by departing from the holding of Wells that courts must not restrict the scope of § 1014 could we accept Krilich's understanding of the statute.

This does not conclude the appeal on the § 1014 counts, because the district judge instructed the jury that the falsified invoices and requisitions "were 'applications' within the meaning of this statute and that the funds withdrawn from the trust accounts pursuant to authorizations by the banks were 'advances' within the meaning of the statute." Krilich argues that this instruction amounted to summary judgment on the "application or advance" element of § 1014, violating the sixth amendment by depriving him of a jury trial on all elements of the offense. See *Sullivan v. Louisiana*, 508 U.S. 275, 277, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993); *United States v. Ladish Malting Co.*, 135 F.3d 484, 490 (7th Cir. 1998).

Krilich objected to this instruction but did not give a reason. Under Fed. R. Crim. P. 30 reasons are essential, so the prosecutor contends that our role is limited to a search for plain error. Fed. R. Crim. P. 52(b). Krilich responds that the reasons were "self-evident", making recitation otiose, and adds that the district judge must have been aware of *United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995), which demonstrates that issues such as these are for juries to decide. Yet it is exactly to avoid speculation about what judges must or should have known that Rule 30 calls for litigants to explain themselves. A citation to *Gaudin* could have led the district judge to withdraw the instruction and avoid this error. Rule 30 does not require elaborate or detailed argument, see *United States v. O'Neill*, 116 F.3d 245, 247 (7th Cir. 1997), but counsel must say enough to inform the judge *why* the instruction is wrong, so that errors can be prevented. *United States v. Roth*, 860 F.2d 1382, 1390 (7th Cir. 1988).

An instruction that removes from the jury's purview questions that under Gaudin the sixth amendment commits to its decision is plain error only if it "seriously affects the

fairness, integrity or public reputation of judicial proceedings". *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 1550, 137 L. Ed. 2d 718 (1997), quoting from *United States v. Olano*, 507 U.S. 725, 736, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993). This showing Krilich does not even attempt to make. He does not say that he denied at trial that the requisitions were "applications", or the disbursements "advances"; the evidence that they were is overwhelming, and no jury could have found otherwise, so Rule 52(b) precludes reversal on account of this error.

V

The United States cross-appeals, contending that the district judge applied the Sentencing Guidelines improperly. Because the underlying conduct for the RICO conviction was bribery, the relevant guideline is § 2C1.1(b)(2)(A):

> If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).

After finding that Krilich's benefit was between $5 million and $10 million, the district court used the table at § 2F1.1(b)(1) to calculate an increase of 14 offense levels but immediately departed downward 7 levels.

Application Note 7(b) to § 2F1.1 provides: "Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted." The judge concluded that a mechanical application of the table significantly overstates the seriousness of Krilich's conduct. According to the United States, the Guidelines do not permit

a departure for this reason. Although § 2C1.1 refers to the *table* in § 2F1.1, it does not adopt the application notes to that table, the prosecutor insists.

Many guidelines incorporate the table in § 2F1.1, and this is not the first time we have had to decide whether judges may refer to the application notes that explain (or limit) the operation of that table. But the last time the subject came up, the parties' positions were reversed: the defendant argued that § 2F1.1's table should be applied without reference to its application notes, and the United States contended that reference to the notes was necessary, indeed obligatory. We held that the table is far from self-explanatory and that reference to its application notes is essential to its accurate application. *United States v. Kim Tae Sung*, 51 F.3d 92, 94-95 (7th Cir. 1995). What's sauce for the goose is sauce for the gander. The district judge was entitled to accept the invitation extended by Application Note 7(b). See *Koon v. United States*, 518 U.S. 81, 94-96, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996).

Any departure, even one based on factors identified by the Sentencing Commission as appropriate, must be carefully considered and explained. We have considerable doubt that the district court's departure satisfies this requirement. Application Note 7(b) authorizes a downward departure if the table overstates the seriousness of the defendant's conduct. But the district judge did not directly address this issue; instead the judge believed that the Sentencing Commission should have made the sentence depend on the loss to third parties rather than the gain to the perpetrator, and it was the lack of a "loss" table that led him to cut in half the number of levels produced by the "gain" table. According to the judge, Krilich's scheme produced a profit for him without an offsetting loss to anyone else, which justified a reduced sentence. Add the gain to the loss and divide by two to get the right result, the judge reasoned.

There is much to be said, as a matter of first principles, for using loss rather than gain as the starting point in determining sanctions. See Richard A. Posner, *Economic Analysis of Law* § 7.2 (5th ed. 1998); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968). Sometimes the Guidelines follow this approach. The table in § 2F1.1 is a loss table, designed for fraud cases (so the touchstone is the victim's loss rather than the offender's gain). But other guidelines, of which § 2C1.1 is an example, use additional benchmarks; § 2C1.1 requires the judge to use the greatest of payment, loss, or benefit, according to the monetary categories in the § 2F1.1 table. Because departure is proper only when a case presents a circumstance "of a kind or to a degree not adequately considered by the Sentencing Commission", 18 U.S.C. § 3553(b), a district court's disagreement with the Commission's resolution of an issue it considered is never an appropriate ground for departure. *Koon*, 518 U.S. at 106.

The district judge's approach is questionable in implementation in addition to being incompatible with the Guidelines. Because the Commission's tables are log-linear (and thus diminish the effect of large numbers), the approach of adding gain to loss and dividing by two should have been applied to the dollar figures, not to the offense level. Suppose the gain was $9 million and the loss zero. The average would be $4.5 million, which under the table in § 2F1.1 would produce a 13-level increase (only one fewer than the 14-level increase appropriate for the $5 million to $10 million range). Cutting the number of levels in half, to seven, gave Krilich the same sentence that would have been meted out to an offender whose gain (or loss caused) was between $120,000 and $200,000. The district judge never explained why Krilich is no more culpable than a person whose crime produces a gain or loss in that range.

What is more, we doubt the premise that Krilich committed a victimless crime. The district judge emphasized that Krilich did not obtain money from the municipalities but simply capitalized on their ability to facilitate investments whose return would not be taxed to the bondholders. That may be so, but the United States Treasury lost approximately a dollar in tax revenue for every dollar Krilich saved. The benefit to Krilich was a reduction in the rate of interest he had to pay to borrow the money for his projects. If interest on the bonds had been taxable, he would have had to pay more to make the investors indifferent between purchasing the taxable instruments and investing in tax-free instruments of equivalent risk, such as municipal bonds. The correspondence between Krilich's gain and loss to the public fisc is not exact, because some investors (pension trusts, for example) do not pay immediate taxes on any of their investments–though their beneficiaries will pay taxes when they receive their pensions. Calculating the actual loss in tax revenues from providing investors with a tax shield that the law does not allow is quite complex, and we do not suggest that a district court is required to undertake the calculation, but the existence of a substantial tax loss is undeniable. The difficulty of determining loss in bribery cases is one reason why the Commission could sensibly decide to focus on perpetrators' gains, which often can be ascertained more readily.

So although a departure might be justified under Application Note 7(b), the district court's reasoning is inadequate to support a seven-level departure. Before deciding on remand whether the table in § 2F1.1 "significantly . . . overstates the seriousness of the defendant's conduct", the district court must recalculate Krilich's gain. Having decided to take a meat axe to the table in § 2F1.1–indeed, having announced even before hearing evidence about Krilich's gain that he would do this–the judge saw little reason to decide whether the gain

exceeded $10 million, as the prosecution contended. Such a finding would add one extra level, but the judge was determined to allow no more than seven from the table, and whether the calculation was 14 – 7 = 7 or 15 – 8 = 7 did not matter. Because the starting point does matter, it must be ascertained with more confidence than the judge expressed in his pronouncement that the $5 million to $10 million range was as good a starting point as any.

On remand the judge should give no weight to the second factor that influenced the departure: the disparity between Krilich's presumptive sentence under § 2F1.1 and Mayor Sarallo's actual sentence, and between Krilich's sentence and those sentences handed out in the Operation Greylord prosecutions of judicial corruption during the 1980s. Consideration of variance among the sentences of different offenders is permissible only when the disparity is "unjustified". *United States v. Meza*, 127 F.3d 545, 549-50 (7th Cir. 1997). Differences that occur as a result of a proper application of the Guidelines in light of the prosecutor's charging decisions are never "unjustified" as Meza defines that term. Krilich has not argued that the Guidelines were incorrectly applied in either his or Sarallo's case. In exchange for Sarallo's cooperation, the prosecutor refrained from charging his most serious offenses. That decision greatly reduced Sarallo's sentence but should not redound to the benefit of the uncooperative Krilich. As for the difference between Krilich's sentence and the penalties imposed more than 10 years ago on state judges who received bribes: if pre-Guidelines sentences under a regime allowing great judicial discretion (and thus great disparity) were allowed to influence the current sentencing mechanism, the Guidelines would be defeated. Sentences today depend on the Guidelines, not on how pre-Guideline cases were handled. *United States v. Fonner*, 920 F.2d 1330, 1335 (7th Cir. 1990).

The convictions are affirmed. The judgment is vacated, and the case is remanded for resentencing.

RIPPLE, Circuit Judge, concurring in part and dissenting in part.

I agree with the opinion of Chief Judge Politz in *United States v. Devoll*, 39 F.3d 575, 579 (5th Cir. 1994), that 18 U.S.C. § 1014 applies only to lending activities by the financial institutions protected by the statute. Contrary to the implication in the majority opinion, Devoll does not stand alone and in opposition to the positions of several other circuits. Notably, each of the cases that has applied the statute has dealt with a situation involving the protected bank's function of extending credit. See *United States v. Yung Soo Yoo*, 833 F.2d 488, 489 (3d Cir. 1987) (defendant convicted of "making false statements to a federally insured bank in order to influence its action on a commitment"); *United States v. Bonnette*, 781 F.2d 357, 359 (4th Cir. 1986) (crediting defendant's account on basis of "sight draft" with auto title attached); *United States v. Tucker*, 773 F.2d 136, 139 (7th Cir. 1985) (whether a letter of credit is within the scope of the statute); cf. *United States v. Erskine*, 588 F.2d 721, 722 (9th Cir. 1978) (holding that the "elements of a section 1014 violation include these requisite mental states: knowledge of falsity, and the intent to influence action by the financial institution concerning a loan or one of the other transactions listed in the statute"). All of these cases are in harmony with the Supreme Court's explicit determination that the statute was designed to provide "penalties for making false statements or reports in connection with loans or other similar transactions." *Williams v. United States*, 458 U.S. 279, 289-90, 73 L. Ed. 2d 767, 102 S. Ct. 3088 (1982) (quoting H.R. Rep. No. 91-1556 at 35 (1970)).

The funds held by the bank in this case involved no extension of credit. Therefore, the statute is inapplicable,

and the convictions based on this section ought to be reversed.

In all other respects, I join the judgment and opinion of the court.

APPENDIX B
1999 U.S. App. LEXIS 1132

UNITED STATES OF AMERICA,
Plaintiff-Appellee, Cross-Appellant,

v.

ROBERT R. KRILICH,
Defendant-Appellant, Cross-Appellee.

Nos. 97-2721, 97-2977

United States Court of Appeals,
Seventh Circuit

Decided January 26, 1999

JUDGES: Before Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

OPINION: Order

Defendant-appellant, cross-appellee filed a petition for rehearing and suggestion of rehearing en banc on November 10, 1998. A judge in active service called for a vote on suggestion of rehearing en banc, * but a majority of the active judges voted to reject the suggestion. ** A majority of the judges on the panel have voted to deny rehearing. *** The petition for rehearing is therefore denied, and the suggestion for rehearing en banc is rejected.

* Judge Flaum did not participate in the consideration of the suggestion for rehearing en banc.

** Judge Ripple and Judge Rovner voted to grant rehearing en banc.

*** Judge Ripple voted to grant rehearing.